EDITOR'S NOTE

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No. 85-7071 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

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JANICE MARIE BUTTRUM,

Petitioner,

-v-

GARY BLACK, Warden
Middle Georgia Correctional
Institute, Women's Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

1. Whether the Court below failed to apply the appropriate standard of review in rejecting Petitioner's claim that the penalty phase argument of the prosecution violated the federal constitutional standard as articulated in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985)?

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No. 85-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JANICE MARIE BUTTRUM,

Petitioner,

-v-

GARY BLACK, Warden
Middle Georgia Correctional
Institute, Women's Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner, JANICE MARIE BUTTRUM, respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of Baldwin County, Georgia, denying relief on the issue presented in this petition.

OPINIONS BELOW

The opinion of the Georgia Supreme Court denying review of the judgment of the Superior Court of Baldwin County appears as Appendix One to this petition. The Order of the Superior Court of Baldwin County is not reported and is found as Appendix Two. The opinion of the Georgia Supreme Court on direct appeal, Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982), appears as Appendix Three.

JURISDICTION

The Order of the Georgia Supreme Court denying review in this matter was entered on March 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

1. Trial Proceedings. Janice Buttrum was tried on a two count indictment charging her with malice murder and motor vehicle theft in August, 1981, in the Superior Court of Whitfield County, Georgia. After being convicted on both counts, she was sentenced to death on the murder count and given a ten year sentence on the theft count. At the penalty phase of her trial, both sides introduced additional evidence. Pursuant to Georgia law, O.C.G.A §17-10-2 (Michie 1982), the prosecutor then delivered his closing argument to the jury which was followed by argument of defense counsel. [The complete argument of the prosecutor appears as Appendix Four].

During his argument to the jury, the prosecutor asked the jury to keep several thoughts in mind as it deliberated as to whether Ms. Buttrum should live or die. Among other things, he told the jury that it should not feel any responsibility for sending Ms. Buttrum to the electric chair.

> I want each and every one of you to know and realize that if a verdict of death is returned in this case, the only person who should feel the responsibility is the Defendant herself. Because of what she did, she, in essence, signed her own death warrant.

Tr. 2153, A-4 at 2.

Just prior to concluding his remarks, the prosecutor return-

ed to this theme.

> Ladies and gentlemen, as I said earlier, it is she, the defendant, that has signed her own death warrant; she, herself, has brought these proceedings down about her. No one, no one else, including you, should feel any responsibility for what happens to her, for it is she that has caused us all to be here today, . . . Now, she is responsibible for her death, no one else. You are a group; you are not simply fourteen individuals. Do not consider that any one of you is throwing the switch. You are merely a cog in the criminal process.

Tr. 2171-72; A-4 at 20-21. Despite a timely defense objection and motion for mistrial, the trial court overruled the motion. Tr. 2172-73; A-4 at 21-22.

On other occasions, the prosecutor repeatedly informed the jury that in his expert opinion, only a sentence of death was appropriate in this case. He told the jury: "[t]his is the ultimate crime. This is the ultimate crime which can only be punished by the ultimate punishment. Anything less would not be adequate." Tr. 2158; A-4 at 7. "This is the ultimate crime. Crimes don't get any worse than this one. You will never hear of a single other solitary murder that is any worse than this one." Tr. 2165; A-4 at 14.

The prosecutor urged the jury to consider other factors during its deliberations. He asked the jury to compare the victim to Petitioner, her murderer. "Demetra Faye Parker [the victim] had no lawyers; Demetra Faye Parker had no public hearing; Demetra Faye Parker had no right to counsel; Demetra Faye Parker had no verdict based upon law." Tr. 2167; A-4 at 16. He also suggested that if a sentence of death was not imposed, "[w]ho will be next? You? Your wife? Your daughter?" Tr. 2164; A-4 at 12. He also instructed the jury that consideration of the notions of mercy and sympathy would be wholly improper.

> You took an oath at the beginning of the case. You said, "I do", to "You shall well and truly try the issue formed upon this Bill of Indictment between the State of Georgia and Danny Buttrum (sic), who is charged with" -- "Janice Buttrum, who is charged with Murder and Theft By Taking, and a true verdict give accordance to evidence. So help You God." "According to evidence"; not according to mercy, not according to sympathy, not according to feeling sor-

> ry for a Defendant. If you want to feel sorry for somebody, feel sorry for those people. (Indicating). Mercy? I submit to you that we should have no sympathy with the sentiment that springs into action whenever a criminal is about to suffer for a crime. Society demands that the crime be punished and criminals warned. The false humanity that starts and shutters when the ax of justice is about to fall is a dangerous element for the peace of society. We had too much of this mercy. It is not true mercy. It looks only at the criminal. . . .

Tr. 2168-69; A-4 at 17-18. The prosecutor, also, in violation of state law, suggested to the jury that a sentence of life meant parole after only seven (7) years incarceration instead of natural life. Tr. 2159; A-4 at 8. The trial court sustained a defense objection to this comment but refused to grant a mistrial. Id. The Court also failed to give the jury any curative instruction. Id.

2. The Proceedings Below. After the Georgia Supreme Court affirmed her convictions and sentence on direct appeal, and this Court denied review, Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982), cert. denied sub. nom., Buttrum v. Georgia, 459 U.S. 1156 (1983), Petitioner instituted state post-convictions remedies. In her Petition for Writ of Habeas Corpus filed in the Superior Court of Baldwin County, Petitioner claimed, inter alia, that the prosecutor's closing argument at the penalty phase of the trial, as it contained a number of improper references to factors which fundamentally misled the jury away from its proper role in a capital sentencing proceeding, violated the Eighth and Fourteenth Amendments to the United States Constitution. See, Petition for Writ of Habeas Corpus, at pp. 25-27. This comprehensive claim was reviewed by the state habeas court on its merits and found to be meritless. That Court held:

> This Court has closely examined the closing argument of the prosecutor at the sentencing phase of the trial and concludes that said argument did not introduce the "passion, prejudice or other arbitrary factors" proscribed by O.C.G.A. Section 17-10-35 (c) (1), nor did it diminish the jury's sense of responsibility or deny the petitioner fundamental fairness. Conner v. State, 251 Ga. 113, 303 S.E.2d 266 (1983); Hance v. State, 254 Ga. 575, 578, ___ S.E.2d ___ (1985). Therefore, this claim by petitioner is without merit.

Order of Superior Court of Baldwin County at p. 10; A-2 at 10. Petitioner then timely moved the Georgia Supreme Court for a Certificate of Probable Cause to review the judgment of the Superior Court of Baldwin County. On March 11, 1986, that Court denied the Application. A-1 at 1.

REASON FOR GRANTING THE WRIT

For the following reasons, this Court should issue a writ of certiorari and give plenary review to this case.

THE COURT BELOW FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW IN REJECTING THIS CLAIM

In the court below, Petitioner urged that the appropriate standard for reviewing a claim that the penalty phase argument of the prosecution violated the federal constitution was found in Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985), as opposed to the more flexible fundamental fairness test employed by the habeas court in denying relief. As the prosecutor's argument in this case repeatedly transgressed Eighth Amendment interests and misled the jury as to what it should consider during deliberations, the lower court's failure to apply the correct standard of review led it to overlook Petitioner's meritorious federal claim.

1. The Misleading Nature of The Argument

In several respects, the argument of the prosecutor fundamentally misled the jury as to what its role was in this capital sentencing proceeding and further as to what factors it could and should consider in reaching its important decision.

First, the jury was told repeatedly that it should not feel any responsibility for a verdict of death as the responsibility for such a sentence lay only with Petitioner. A-4 at 2 and 20-21. Driving this point home near the end of his argument, the prosecutor told the jury that "[d]o not consider that any one of you is throwing the switch. You are merely a cog in the criminal process." Id. These remarks are indistinguishable from those

condemned by this Court in Caldwell. There, this Court held that it was constitutionally impermissible for a death sentence to stand when made by a sentencer who had been led to believe that it was not responsible for its decision. 105 S.Ct. at 2640. In Caldwell, the prosecutor had misled the jury by suggesting that its determination as to sentence was fully reviewable by the Mississippi Supreme Court. The Court pointed to several reasons why arguments suggesting that the jury can shift its sense of responsibility to someone else are wholly at odds with the Eighth Amendment's "need for reliability". Id.

As in Caldwell, the prosecutor here attempted explicitly to relieve the jury's sense of "awesome responsibility" by assuring each member that they simply were not responsible; that only Petitioner was responsible; and that as jurors, they were just another "cog" in the criminal justice system. It's message, like the one in Caldwell, was to "offer jurors a view of their role that might frequently be highly attractive", one which could lead the jury "to minimize the importance of its role." 105 S.Ct. at 2641-42.

Second, the jury received this message from a prosecutor who exploited his role as the chief law enforcement officer in the County. Long ago, this Court recognized the influence improper remarks and suggestions can have on a jury when made by a prosecutor. In Berger v. United States, 295 U.S. 78, 88 (1934), this Court held that "improper suggestions, insinuations, and especially, assertions of personal knowledge, are apt to carry much weight against the accused when they should properly carry none." Appearing more like an expert witness than an advocate, the prosecutor in this case, on more than one occasion, told the jury that the only just sentence was a death sentence. See, A-4 at 7 and 14. These remarks further served to relieve the jury of its duty and responsibility to judge for itself the appropriate sentence in this case.

Third, the prosecutor urged the jury to consider factors having no legitimate place in capital sentencing deliberations,

while at the same time exhorting the jury not to consider relevant, valid penological circumstances. During his argument, he asked the jury to compare the victim and her worth to the community with Petitioner's, and to compare the lack of "due process" Petitioner showed to the victim during the crime vis-a-vis the many rights Petitioner enjoyed after her arrest and through trial. A-4 at 16. The suggestion to weigh the character of the victim is constitutionally irrelevant and prejudicial as it has nothing to do with the proper focus of the sentencing hearing: the character of the defendant and the circumstances of the crime. Zant v. Stephens, 462 U.S. 862 (1983). The suggestion that Petitioner should die because she had a lawyer and a trial, while the victim had neither, inappropriately suggested to the jury that it should penalize Petitioner for having exercized her constitutional rights to counsel and trial. See, Wainwright v. Greenfield, ___ U.S. ___, 106 S.Ct. 634 (1986).

At the same time, the prosecutor told the jury that it should not consider a traditionally important factor; he told them it would be improper to consider mercy or sympathy in reaching it's sentencing decision. A-4 at 17-18. These remarks misled the jury as "the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decision in capital cases." Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985).

Finally, in violation of state law, the prosecutor injected the notion that a life sentence in Georgia did not mean life without parole. A. at 8. This argument was strictly forbidden by Georgia law, Cargill v. State, ___ Ga. ___, 340 S.E.2d 891 (1986), and misled the jury as to the consequences of a life sentence. California v. Ramos, 463 U.S. 992 (1983).

2. Use of the Improper Standard of Review.

While the remarks of the prosecutor summarized above were clearly misleading to the lay jury selected to decide Petitioner's fate, the courts below performed no detailed review of

their character. Instead, the state habeas court denied relief because "said arguments did not introduce the 'passion, prejudice or other arbitrary factors' proscribed by O.C.G.A Section 17-10-35 (c)(1), nor did it diminish the jury's sense of responsibility or deny the Petitioner fundamental fairness." A-2 at 10. This standard of review, similar to the general due process standard announced by this Court in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), was found to be inadequate by this Court in Caldwell where the remarks mislead the jury as to its fundamentally role in a capital sentencing hearing. The Court held that in the wake of such argument, a sentence of death must be vacated unless it can be demonstrated that the argument had "no effect" on the sentence. 105 S.Ct. at 2646.

No fair reading of the decision below even remotely suggests that the Caldwell test was applied to the improper remarks in this case. Because of the conflict between Caldwell and the decision below, review by writ of certiorari is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue.

Respectfully submitted,

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By: _____
Counsel of Record

ATTORNEYS FOR PETITIONER

No. 85-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JANICE MARIE BUTTRUM,

Petitioner,

-v-

GARY BLACK, Warden
Middle Georgia Correctional
Institute, Women's Division,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon Respondent by depositing copies of same in the United States Mail, with proper first class postage affixed thereto, addressed as follows:

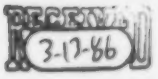
Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 6TH day of June, 1986.

ATTORNEY FOR PETITIONER

APPENDIX ONE

Application No. 3512



SUPREME COURT OF GEORGIA

ATLANTA March 11, 1986

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JANICE BUTTRUM V. GARY BLACK, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

APPENDIX TWO

RECEIVED
12-21-85

IN THE SUPERIOR COURT OF BALDWIN COUNTY,

STATE OF GEORGIA.

JANICE BUTTRAM,	:	CIVIL ACTION NO. 19201
Petitioner	:	HABEAS CORPUS
v.	:	
GARY BLACK, WARDEN, MIDDLE GEORGIA CORRECTIONAL INSTITUTION, WOMEN'S DIVISION,	:	
Respondent	:	

ORDER

The above-styled case comes before this Court on Petitioner's Amended Petition for Writ of Habeas Corpus. A hearing in this matter was held on May 9, 1985, in the Superior Court of Baldwin County, Milledgeville, Georgia, at which time both parties, through counsel, presented arguments to the Court. The Court took the matter under advisement, allowing counsel for each party time to submit supplemental briefs.

1.

Petitioner seeks funds in order to present her claims that the trial court's denial of funds for a psychiatrist to address the State's expert witness, Dr. Adams, violated her constitutional rights. The issue of granting funds for a psychiatrist was raised on direct appeal to the Supreme Court of Georgia and decided adversely to petitioner.

Buttram v. State, 249 Ga. 652, 654, 293 S.E. 2d 334 (1982). This Court is bound by the decision of the Supreme Court and will adhere to its ruling on this issue. Brown v. Ricketts, 233 Ga. 809, 213 S.E. 2d 672 (1975).

Petitioner also asks this Court for funds for the purpose of obtaining evidence of pre-trial publicity not presently in the record and to secure an expert to evaluate and weigh the effects of said publicity. Whether or not there existed significant pre-trial publicity which was not presented to the trial court would seem to raise issues involving the effectiveness of petitioner's trial counsel. As petitioner has withdrawn her claim of ineffective assistance of trial counsel, this issue is not properly before this Court. Furthermore, issues concerning defendant's motion for change of venue and the alleged inadequacy of the voir dire were decided adversely to petitioner on direct appeal. Buttram v. State, supra, at 654.

2.

Petitioner alleges that the Charge to the jury at the competency trial placed the burden of proof on the petitioner in violation of her right to a fair trial and due process of law. Petitioner also claims that the trial court's Charge used the term "sanity" rather than "competency" during the hearing on the special plea of insanity and that

the alleged misuse of those terms could have misled the jury. Both of these issues were raised on direct appeal, Buttram v. State, supra, at 654, and decided adversely to petitioner. This Court will adhere to the ruling of the Supreme Court of Georgia.

3.

Petitioner alleges that the denial of her request for funds to hire an investigator, pathologist and psychiatrist violated her constitutional rights. These issues were raised on direct appeal to the Supreme Court of Georgia and decided adversely to petitioner. Buttram v. State, supra, at 654. Petitioner cites as supporting authority the decision in Ake v. Oklahoma, ____U.S. ___, 105 S. Ct. 1087 (1985). This Court agrees with respondent's argument that the effect, if any, of Ake v. Oklahoma, supra, on Georgia cases is for the Supreme Court of Georgia to decide. Therefore, this Court will not reconsider this issue.

4.

Petitioner alleges that at trial she was entitled to any exculpatory evidence in the State's possession, but that she has not gained access to the State's file to determine whether it includes any exculpatory evidence. Petitioner has produced no evidence as to what specific information she is requesting, how such information is

material to her case, or in what manner it is favorable to her. Neither has she shown that any exculpatory material in the State's file was not released to her. Petitioner must show what material was suppressed and how this prejudiced her. Williams. v. State, 251 Ga. 749, 789, 312 S.E. 2d 40 (1983). Mere speculation that exculpatory items might exist is not enough. Williams v. State, supra, at 789. Furthermore, the State is not required to open its file for general inspection by a defendant. Julian v. State, 134 Ga. App. 592, 593 (3), 215 S.E. 2d 496 (1975). Therefore, this claim by petitioner is without merit.

5.

Petitioner contends that her constitutional rights were violated when the trial court failed to sustain the objection to the admission of inculpatory statements made by petitioner after her arrest in Florida. Specifically, petitioner claims the arrest was illegal because the arrest warrant was invalid for two reasons: first, that the justice of the peace system is unconstitutional because it operates under a fee system and, second, that the justice of the peace who issued the warrant was disqualified because he was also a deputy sheriff. This claim was raised on direct appeal and decided adversely to petitioner. Buttram v. State, supra, at 653. This Court will adhere to the ruling of the Supreme

Court of Georgia.

Petitioner also claims that she was not adequately advised of her right to remain silent and her right to assistance of counsel after her arrest in Florida. Petitioner further claims that the record fails to show that she gave a knowing and intelligent waiver of these said rights. This Court has reviewed the record and finds that petitioner was clearly advised of all these said rights on several occasions; that she understood her rights; that she executed a knowing, intelligent and willing waiver to said rights; and that her confessions were given voluntarily, freely, willingly, and were not induced by hope of benefit or fear of injury.

6.

Petitioner contends that the introduction, through State's witness Leon Busby, of an out-of-court statement made by petitioner's husband violated her constitutional rights. This issue was raised on direct appeal and decided adversely to the petitioner. Buttram v. State, supra, at 654-655. This Court will adhere to the ruling of the Supreme Court of Georgia.

7.

Petitioner alleges that the introduction of certain photographs of the victim denied her a fundamentally fair

trial. Georgia's death penalty statutes provide for the presentation of evidence in aggravation of punishment. O.C.G.A. Section 17-10-2. In cases in which the death penalty may be authorized, the jury may be instructed to consider certain statutory aggravating circumstances. O.C.G.A. 17-10-30. One of the statutory aggravating circumstances the jury was asked to consider in the present case was O.C.G.A. Section 17-10-30 (b) (7), which states:

> The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

The evidence in this case showed that the victim was raped and stabbed 97 times. This Court finds that the introduction of the subject photographs was proper for the purpose of determining the appropriate punishment.

8.

Petitioner argues that the prosecutor improperly commented on petitioner's having exercised her right to silence in not having taken the witness stand. This Court has closely reviewed that portion of the trial transcript containing the prosecutor's closing argument. The specific part to which petitioner objects reads:

> Defense? There is none. There has not been one iota of evidence to indicate that this defendant did not do what she is charged with....

The thrust of the prosecutor's case was that the petitioner was an active, willing and aggressive participant in a conspiracy to commit murder. Through its line of questioning and cross-examination throughout the trial, the defense tried to show that the murder was planned and executed solely by Danny Buttram. Thus viewed in the context of the charges against petitioner, this Court finds that the prosecutor's statements were made for the purpose of arguing petitioner's involvement in the crime. Furthermore, the Georgia Supreme Court has held that a prosecutor's comment on the failure of the defense to rebut the State's evidence is not necessarily improper. Ranger v. State, 249 Ga. 315, 319 (1982); Lowe v. State, 253 Ga. 308, 309, 319 S.E. 2d 834 (1984).

Petitioner alleges that the prosecutor made improper remarks in his closing argument when he expressed his "personal opinion" that the evidence was overwhelming. Specifically, petitioner objects to the prosecutor's remarks beginning with, "I've tried cases - a lot of cases in this court, and sometimes I've tried where there was really too much evidence ..." (Tr. 1708). This portion of the prosecutor's argument, referring to his prior criminal experience was not relevant to any issue in the case and was, therefore, improper. However, reviewing these remarks,

this Court finds that they were not so prejudicial or offensive and did not involve such egregious misconduct as to be a violation of petitioner's constitutional right to a fair trial.

As regards petitioner's objections to the prosecutor's reference to an article by former Attorney General Griffin Bell, this Court finds the prosecutor's argument fell within the parameters of proper closing arguments as discussed in Conner v. State, 251 Ga. 113, 303 S.E. 2d 266 (1983). This Court finds that the remainder of petitioner's objections to the prosecutor's closing argument are without merit.

9.

Petitioner alleges that the trial court's Charge to the jury on "conspiracy" violated her constitutional rights. Issues concerning the conspiracy charge and petitioner's claims relating to Enmund v. Florida, 458 U.S. 782 (1982), were raised on direct appeal and decided adversely to defendant. Buttram v. State, supra, at 654, 657. This Court will adhere to the rulings of the Supreme Court of Georgia.

10.

Petitioner argues that Dr. Adams' testimony during the penalty phase violated petitioner's Fifth, Sixth and

Fourteenth Amendment rights. Petitioner contends that because she was not advised of her right to remain silent, and because neither she nor her counsel were told of the possible use of statements she made during her psychiatric examination at Central State Hospital, the State is precluded from relying on what Dr. Adams says to establish petitioner's future dangerousness. The Court finds this argument without merit. The record shows that at a pre-trial hearing on petitioner's motion for a private psychiatrist, the trial court, while denying said motion, did enter an order granting a psychiatric examination at Central State Hospital. The Court ordered that a report be provided with respect to petitioner's competency to stand trial and her "degree of criminal responsibility." The trial court also ordered that said psychiatric report should be made available to the court, counsel for the defense, and to the district attorney. Copies of two reports from Central State Hospital were sent to the trial judge, defense counsel, and district attorney. Petitioner's counsel sought a psychiatric examination of petitioner, knew the scope of the examination as set out in the court's order, received copies of the results, was aware that the State had received copies, and was given notice prior to trial that Henry Adams would be called as a State witness. The Court finds no violation of Fifth or Sixth Amendment rights.

11.

Petitioner argues that the prosecutor's closing argument during the sentencing phase of the trial, denied her right to receive a fair trial.

This Court has closely examined the closing argument of the prosecutor at the sentencing phase of the trial and concludes that said argument did not introduce the "passion, prejudice or other arbitrary factors" proscribed by O.C.G.A. Section 17-10-35 (c) (1), nor did it diminish the jury's sense of responsibility or deny the petitioner fundamental fairness. Conner v. State, 251 Ga. 113, 117-122, 303 S.E. 2d 266 (1983); Hance v. State, 254 Ga. 575, 578, ____ S.E. 2d ____ (1985). Therefore, this claim by petitioner is without merit.

12.

Petitioner contends that her sentence of death is unconstitutional because the death penalty is applied in Georgia in an arbitrary and discriminatory manner. On direct appeal, the Supreme Court of Georgia specifically held that the sentence of death in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor. Buttram v. State, supra, at 656.

Petitioner argues that the system of administration of the death penalty in Georgia is discriminatory, specifi-

cally, that persons convicted of the murder of whites are sentenced to death at a greater frequency than those who kill blacks. For support, petitioner relies on the dissenting opinion in McCleskey v. Kemp, 753 F. 2d 877 (11th Cir. 1985). However, this Court notes that the majority decision found this claim to be without merit. Furthermore, petitioner proffered no evidentiary or factual support for her claim, and said claim is, therefore, denied.

13.

Petitioner claims imposition of the death sentence was unconstitutional because of her age of 17 at the time of the crime. Petitioner also argues that the sentence is unconstitutional because of the presence of mitigating factors.

The Supreme Court of Georgia, in reviewing the death penalty in this case, considered cases appealed to it since January 1, 1970, in which a death or life sentence was imposed. In so doing, the Court found that the sentence of death in petitioner's case was neither excessive nor disproportionate. The Supreme Court noted that in the sentencing phase the defendant was allowed to present several witnesses who testified as to her deprived upbringing and other childhood factors. The jury was instructed to consider all evidence in mitigation. The

existence of mitigating factors does not mandate against a death penalty. These claims by petitioner are without merit.

14.

Petitioner argues that the exclusion of testimony during the sentencing phase of the defendant's witness, Jesse Collette, deprived petitioner of a full, fair sentencing trial. Petitioner contends that the purpose of this testimony was to show that petitioner's husband played the leading role in the killing. This Court notes that the Supreme Court of Georgia found that there was no issue as to the "direct and active participation of this defendant in the murder." Buttram v. State, supra, at 657. After reviewing that portion of the transcript concerning the testimony of Jesse Collette, as well as petitioner's arguments on this issue, this Court finds that the exclusion of the testimony did not deprive petitioner of a full and fundamentally fair sentencing determination.

WHEREFORE, the petitioner having shown no violation of her constitutional rights, it is hereby ordered that the Petition for a Writ of Habeas Corpus be denied with prejudice and that Petitioner be remanded to the custody of the Respondent for service of her sentence previously imposed in accordance with the law.

IT IS FURTHER ORDERED, that if Petitioner desires to appeal this order, she must file a written application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the entry of this order, and that she must also file, within the same period of time, a notice of appeal with the Clerk of Baldwin Superior Court.

SO ORDERED, this 17th day of December, 1985.

Joseph B. Duke

Joseph B. Duke
Judge, Superior Courts
Ocmulgee Judicial Circuit

APPENDIX THREE

or unusual because of their lengths. U.S.C.A.Const.Amend. 8.

6. Criminal Law ⇐1077.3

Defendant's appeal, enumerating six possible errors, was wholly frivolous, and accordingly, defense counsel's motion to withdraw would be granted and judgment of conviction affirmed.

Stephen H. Harris, Savannah, for Gary Allen Waters.

Spencer Lawton, Jr., Dist. Atty., Savannah, Michael J. Bowers, Atty. Gen., for the State.

JORDAN, Chief Justice.

Gary Allen Waters was convicted of criminal attempt to commit robbery by intimidation, simple battery, and motor vehicle theft. He was sentenced to serve consecutive sentences of ten years, twelve months, and 5 years, respectively.

His appointed counsel has filed a motion and brief stating that after careful review of the record he finds no basis for an appeal, that any appeal in this case would be wholly frivolous, and requesting permission to withdraw from the appeal in accordance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Six possible errors in the trial court are enumerated for our consideration. None has any merit.

[1] 1. Waters was not entitled to a preliminary hearing. *State v. Middlebrooks*, 236 Ga. 52, 222 S.E.2d 343 (1976).

[2] 2. Alcoholism was Waters' defense to the charges, there being no question but that he was the person who had committed the offenses. He was examined by the forensic services team of the Georgia Regional Hospital at Savannah and was not, on the facts of this case, entitled to an independent medical examination. *Blanchard v. State*, 247 Ga. 415, 419(5), 276 S.E.2d 593 (1981).

[3] 3. No harmful error was committed under the recidivist statute (Code Ann. § 27-2511) despite the fact that the indictments were not drawn in reference to that statute because the sentences Waters received are within the limits applicable to first offenders. *Johnson v. Hopper*, 238 Ga. 670, 671, fn. 1, 235 S.E.2d 27 (1977).

[4] 4. Neither is the recidivist statute (Code Ann. § 27-2511) unconstitutional for any reason enumerated. *Knight v. State*, 243 Ga. 770, 257 S.E.2d 182 (1979).

[5] 5. The sentences imposed were not cruel or unusual because of their lengths. *Knight v. State*, 243 Ga. at 772, 257 S.E.2d 182.

6. No abuse of discretion by the trial court during voir dire examination has been illustrated on appeal.

[6] After review of the record and transcript, we have determined that the appeal is wholly frivolous. Accordingly, we grant defense counsel's motion to withdraw and affirm the judgment of the trial court. *Norris v. State*, 245 Ga. 136, 263 S.E.2d 161 (1980); *Miller v. State*, 245 Ga. 137, 263 S.E.2d 441 (1980); *Quarterman v. State*, 244 Ga. 215, 259 S.E.2d 468 (1979).

Judgment affirmed.

All the Justices concur.

249 Ga. 652

BUTTRUM

v.

The STATE.

No. 38436.

Supreme Court of Georgia.

July 8, 1982.

Defendant was convicted in the Superior Court, Whitfield County, Charles A. Pan-

nell, Jr., J., of murder and theft of victim's car, and she appealed. The Supreme Court, Weltner, J., held that: (1) trial court did not err in denying defendant's motion for change of venue and failing to disqualify two jurors who had formed an opinion as to guilt; (2) evidence obtained from defendant's motel room and from victim's car was admissible; (3) statements given to arresting officers were admissible; (4) trial court did not abuse its discretion in denying motion for funds for expert witnesses; (5) letter written to chief jailer and letter written to defendant's husband were admissible; (6) trial court did not err in allowing expert testimony at sentencing phase of defendant's trial; (7) evidence of defendant's prior conviction was admissible at sentencing phase as rebuttal; and (8) death sentence was not imposed under influence of passion, prejudice or any other arbitrary factor and was fully supported by the evidence.

Affirmed.

Hill, P. J., concurred in judgment.

Gregory, J., dissented in part.

1. **Criminal Law** ⇐126(2)
Jury ⇐103(1)

Trial court did not err in denying defendant's motion for change of venue because of alleged extensive publicity and in failing to disqualify two jurors who had formed an opinion as to guilt where all jurors stated unequivocally that they could put aside any opinions they had and reach a verdict based on the evidence.

2. **Searches and Seizures** ⇐7(10)

Having abandoned motel room, defendant no longer had any expectation of privacy and could not complain of owner manager's entry and search of the room.

3. **Justices of the Peace** ⇐32

Justice of the peace system was not unconstitutional.

4. **Criminal Law** ⇐394.4(9), 412.1(3)

While there may have been some technical deficiency in status of magistrate who issued arrest warrant regular on its face, evidence obtained and statements defendant made to FBI agents at time of her arrest were not required to be suppressed.

5. **Searches and Seizures** ⇐7(26)

Defendant had no standing to complain of search of car she had stolen.

6. **Criminal Law** ⇐331

Defendant had burden of proof as to her special plea of mental incompetency.

7. **Criminal Law** ⇐805(3)

Trial court did not err in using word "sanity" rather than "competency" in charge as relating to defendant's special plea of mental incompetency.

8. **Costs** ⇐30⅄2(2)

Trial court did not abuse its discretion in denying defendant's motion for funds for expert witnesses where defendant did not contest any evidence presented against her and made no showing as to what benefits could have been gained by granting her the funds.

9. **Criminal Law** ⇐433

Letter written by defendant to chief jailer which was not solicited nor the result of any interrogation was admissible.

10. **Criminal Law** ⇐422(8)

Witness' testimony as to conversation with codefendant held in presence of defendant was admissible in that it had a direct bearing on contended conspiracy between defendant and codefendant.

11. **Criminal Law** ⇐486

An expert witness may give his opinion as long as he states facts on which he bases his conclusion.

12. **Criminal Law** ⇐486

Fact that expert's opinion was based in part on facts not in evidence went to weight and credibility and not to its admissibility.

13. **Criminal Law** ⇐1158(4)

Trial court's finding that letter written by defendant to her husband while both were in jail awaiting trial and which contained statement indicating knowledge that

notes passed between them were read by the guards was not a confidential communication was supported by the evidence.

14. Criminal Law ⇐986.2(4)

Prior conviction for simple assault was admissible as rebuttal at sentencing phase without prior notification after defendant had presented several witnesses who testified as to her nonviolent nature.

15. Criminal Law ⇐1005

Unified appeal procedure was not unconstitutional.

16. Homicide ⇐354

Death sentence for murder conviction was not imposed under influence of passion, prejudice or any other arbitrary factor.

17. Criminal Law ⇐986.6(2)

Jury was not precluded from considering, at sentencing phase of capital case, defendant's deprived upbringing and other factors in her childhood.

18. Homicide ⇐354

Aggravating circumstances supporting death sentence upon defendant's murder conviction were fully supported by the evidence.

Steve K. Fain, J. Mike Brown, Dalton, for Janice Buttrum.

Stephen A. Williams, Dist. Atty., Dalton, Michael J. Bowers, Atty. Gen., Charles E. Brown, Asst. Atty. Gen., for the State.

WELTNER, Justice.

The defendant was indicted for the murder of Demetra Faye Parker and the theft of her car. She was convicted on both counts and sentenced to death for the murder and ten years for motor vehicle theft. The jury in recommending the death penalty found the existence of four statutory aggravating circumstances. The victim was raped, sodomized and stabbed 97 times during the early morning hours of September 3, 1980, and her body was discovered by the manager that morning in her room at a motel where she was a guest. The defendant and her husband were also occupants of the same motel. The key to defendant's room was found on the counter in the motel office. Upon inspection of their room, a bloody wash cloth and bar of soap was found. The police were notified and warrants were issued for both defendant and her husband. They were arrested in Florida and returned to Georgia. The husband was tried first, convicted and sentenced to death. He committed suicide while his appeal was pending in this Court.

1. We will deal first with errors claimed during the guilt-innocence phase of the trial.

Enumerations of error 3 and 4 contend the trial court erred in denying defendant's motion for change of venue and failing to disqualify 2 jurors who had formed an opinion as to guilt. The defendant argues that by reason of extensive publicity from all the news media, a fair trial was impossible.

"'The test as to whether pretrial publicity has so prejudiced a case that an accused can not receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such publicity.' *Dampier v. State*, supra [245 Ga. 427, 431, 265 S.E.2d 565 (1980)]. 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1960)." *Messer v. State*, 247 Ga. 316(4), 276 S.E.2d 15 (1981).

[1] In the present case, 22 prospective jurors were excused for cause. A majority of the 42 prospective jurors put upon defendant stated that they had been exposed to varying degrees of publicity. All stated unequivocally that they could put aside any opinions they had and reach a verdict based on the evidence. There is no merit in these enumerations.

2. Enumeration of error 5 contends the trial court erred in overruling her motion to suppress the evidence obtained from her motel room, statements given to arresting officers, and evidence obtained from the victim's car.

[2] The defendant first argues that evidence obtained from the motel room on September 3 without a search warrant should be suppressed because rent had been paid in advance until September 5, and she and her husband were therefore still in constructive possession. The motel owner-manager found the key to defendant's room on the counter in the office on the morning of September 3, and upon inspection discovered that all of their personal belongings had been removed from the room, whereon he concluded that they had abandoned the premises. Having abandoned the premises, defendant no longer had any expectation of privacy, and may not complain of the entry and search of the room.

The defendant contends that her statement given to FBI agents in Florida should be suppressed because the arrest warrant was invalid for two reasons. First, that the justice of the peace system is unconstitutional because it operates under a fee system, and, secondly, that the justice of the peace who issued the warrant was disqualified because he was also a deputy sheriff.

[3] Appellant's attack upon the present justice of the peace system is without merit. The Georgia statutes subsequent to the 1977 amendment satisfied the constitutional requirements set forth in *Connally v. Georgia*, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977). *Roberts v. State*, 243 Ga. 604(5), 255 S.E.2d 689 (1979).

The second contention of defendant—that the issuing magistrate was a deputy sheriff and hence disqualified from issuance of an arrest warrant—must be considered in light of all the facts and requirements of law as to arrest warrants.

[4] In *Thompson v. State*, 248 Ga. 343, 285 S.E.2d 685 (1981), we disapproved of a *per se* rule in Fourth Amendment cases. In the present case the defendant was arrested in Florida pursuant to an FBI fugitive warrant issued in good faith reliance on the Georgia arrest warrant regular on its face. While there may have been some technical deficiency in the status of the issuing magistrate, we find nothing which would require suppression of the evidence obtained and of the statements of the defendant made at the time of her arrest. *Michigan v. DeFillippo*, 443 U.S. 31, 35, 99 S.Ct. 2627, 2630, 61 L.Ed.2d 343 (1979).

[5] The remaining ground of defendant's motion to suppress concerned the evidence obtained from the victim's car. A defendant has no standing to complain of the search of premises or property of another. *Cervi v. State*, 248 Ga. 325(2), 282 S.E.2d 629 (1981).

[6, 7] 3. Enumerations of error 6 and 7 contend that the trial court erred in placing upon defendant the burden of proof as to her special plea of mental incompetency, and in using the word "sanity" rather than "competency" in his charge. The burden of proof upon a special plea is on the defendant. *Banks v. State*, 246 Ga. 178(3), 269 S.E.2d 450 (1980); *May v. State*, 146 Ga. App. 416, 246 S.E.2d 432 (1978). Nor do we find any error in the charge on the special plea.

4. Enumeration of error 8 contends the trial court erred in denying defendant funds to employ a psychiatrist, field investigator and forensic criminologist. The defendant does not contest any of the evidence presented against her, nor was any showing made at the hearing held on the motion as to what benefits could be gained by granting her funds for the hiring of such experts.

[8] We recently held in *Sabel v. State*, 248 Ga. 10(6), 282 S.E.2d 61 (1981), that: "A criminal defendant on trial for his liberty is entitled on motion timely made to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." The defendant in this case made no contention that any critical evidence was subject to varying

opinion, but in answer to the trial court's inquiry as to what further test he wanted stated. "At this point in time, no, there is not. If there is one, we will let the court know before the week expires." We cannot say, based upon this record, that the trial court abused its discretion in denying the motion for funds for expert witnesses. *Messer v. State*, 247 Ga. 316(1), 276 S.E.2d 15 (1981).

[9] 5. Enumeration of error 9 complains of the admission in evidence of a letter written by defendant. The letter introduced at the guilt-innocence phase of the trial was written to the chief jailer. The letter was not solicited, nor was it the result of any interrogation, and sought to relieve her husband of any blame for the murder and rape of the victim by stating that she had coerced him into participating in the crimes. The trial court did not err in admitting this letter. *Stevens v. State*, 247 Ga. 698(7), 278 S.E.2d 398 (1981).

6. Enumerations of error 11 and 12 contend the trial court erred in admitting testimony of a conversation with defendant's husband in her presence, and the charge of the court on conspiracy.

[10] The testimony objected to occurred on the night of the crime when the witness, the defendant and her husband were riding around and he testified as follows: "He asked me if I knew where I could get him a girl at. Q. What did you reply? A. I said, won't your wife get mad at you for talking like that? No, as long as she gets to go with her first." This testimony had a direct bearing on the contended conspiracy between defendant and her husband. The statements made by the co-defendant in the presence of appellant were admissible. See *Sprouse v. State*, 242 Ga. 831(2), 252 S.E.2d 173 (1979), and cits. There was no error in admitting this testimony, or in the charge concerning conspiracy.

7. Enumeration of error 1 contends the trial court erred in allowing the testimony of Dr. Henry Adams at the sentencing phase of her trial. The defendant argues that the only way an expert witness may give his opinion is in response to hypothetical questions based upon facts in evidence.

[11, 12] It has long been the rule in this state that an expert witness may give his opinion as long as he states the facts on which he bases his conclusion. The fact that an expert's opinion may be based in part on facts not in evidence goes to the weight and credibility, not to its admissibility. *Redfield v. State*, 240 Ga. 460(1), 241 S.E.2d 217 (1978) and cases cited. There is no merit in this enumeration of error.

8. Enumeration of error 10 complains of a letter introduced at the sentencing phase. The letter was written by defendant to her husband while both were in jail awaiting trial. The letter was given to a guard for delivery. Under rules of the jail imposed by the sheriff, all communications between prisoners were to be read and anything out of the ordinary reported to the sheriff. The letter contained an incriminating statement and the note also contained a statement indicating knowledge that notes passed between them were read by the guards.

[13] The defendant objected to the admission of this letter, contending it was a confidential communication between husband and wife under Code Ann. § 38-418(a, 1), and excludable. The trial court excused the jury and held a hearing in which it found that there must be some expectation of confidentiality to be privileged under this court's holding in *Lowry v. Lowry*, 170 Ga. 349(6), 153 S.E. 11 (1930). The court further found that the note itself indicated that their messages were being intercepted and that defendant had no reasonable expectation of confidentiality. The trial court's finding that the letter was not a confidential communication being supported by the evidence, we find no merit in this enumeration of error.

9. Enumeration 13 contends it was error to allow the State to introduce a prior conviction for simple assault at the sentencing phase without prior notification as required by Code Ann. § 27-2503. The State introduced evidence of a prior guilty plea to the charge of simple assault after the defend-

ant had presented several witnesses who testified as to her nonviolent nature.

[14] The testimony introduced by defendant was in the nature of character evidence and it was not error to admit this evidence as rebuttal. *Hearn v. State*, 145 Ga.App. 469(2), 243 S.E.2d 728 (1978); *Mize v. State*, 240 Ga. 197(6), 240 S.E.2d 11 (1977).

[15] 10. Enumeration 14 contends the Unified Appeal Procedure is unconstitutional. All of defendant's contentions have been decided adversely to her in *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981) cert. den., --- U.S. ---, 102 S.Ct. 1442, 71 L.Ed.2d 657. There is no merit in this enumeration of error, and the trial court did not err in overruling her motion for new trial as contended in enumeration 15.

SENTENCE REVIEW

[16] As required by Georgia Laws, 1973, p. 159, et seq., (Code Ann. § 27-2537(c)(1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury and the evidence concerning the crimes and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor.

[17] The defendant contends that under the holding of the United States Supreme Court in *Eddings v. Oklahoma*, —- U.S. ---, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), that the court should have been instructed to consider the person of the defendant as a young and deprived girl with a sad and complex life. In the sentencing phase the court allowed the defendant to present several witnesses who testified as to her deprived upbringing, and to other factors in her childhood. There is no merit that the jury was precluded from considering these factors, as they were advised to consider all the evidence presented in mitigation.

[18] The jury found the following aggravating circumstances: The offense of murder was committed while engaged in another capital felony, to wit, rape, and that the murder was outrageously, wantonly vile and inhuman in that it involved torture, depravity of mind and battery to the victim. The jury was instructed separately as delineated by this court in *Hance v. State*, 245 Ga. 856(3), 268 S.E.2d 339 (1980). The jury made a specific finding and found all three factors of *Hance*, supra. We have reviewed the record and find that the aggravating circumstances as found were fully supported by the evidence, under the stimulus of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

We have reviewed the charge of the trial court to the jury in this case and found it not subject to the defects dealt with in *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977), or in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977).

This court has independently reviewed the record as mandated by the Unified Appeal Procedure and has found no addressable error with the exception of the issues raised in *Enmund v. Florida*, — U.S. ---, 102 S.Ct. 3368, 73 L.Ed.2d 1140) (Case No. 81-5321), recently decided by the U. S. Supreme Court. The evidence in this case shows that prior to leaving the crime scene where the victim was murdered, this defendant cut the victim across the abdomen with the murder weapon and when asked why, she stated that this was the only place left to cut her and that "that girl sure didn't want to die." Therefore no issue is raised as to the direct and active participation of this defendant in the murder.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that similar cases listed in the appendix support the affirmance of the death penalty.

This was a particularly brutal murder in that the victim was raped, sodomized and stabbed 97 times after letting the defendant into her motel room in the early morning hours under the pretense that some-

thing was wrong with her baby. Thereafter the defendant and her husband robbed the victim and stole her automobile for the purpose of making their escape from the scene. The 15 cases in the appendix in which the death penalty was imposed support the death penalty in the case. All of these cases involve the deliberate, unprovoked killing of a victim in conjunction with a sex crime, and thus show the willingness of the jury to impose the death penalty similar circumstances.

The crimes of Janice Buttram can only be described as butchery and barbarism. The sentence of death is neither excessive nor disproportionate.

Judgment affirmed.

All the Justices concur, except HILL, P. J., who concurs in the judgment only.

GREGORY, J., dissents to division 7 and the affirmance of the death sentence.

APPENDIX

McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976); *Dix v. State*, 238 Ga. 209, 232 S.E.2d 47 (1976); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Spraggins v. State*, 240 Ga. 799, 243 S.E.2d 26 (1978) (affirmed on resentencing, 243 Ga. 73, 252 S.E.2d 620 (1979)); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978) (affirmed after remand from U. S. Supreme Court, 243 Ga. 131, 252 S.E.2d 625 (1979)); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979) (affirmed on resentencing, 246 Ga. 261, 271 S.E.2d 352 (1980)); *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979) (addendum 246 Ga. 262, 271 S.E.2d 172 (1980)); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *Nelson v. State*, 247 Ga. 172, 274 S.E.2d 317 (1981).

249 Ga. 673

PARKER

v.

STATE.

No. 38458.

Supreme Court of Georgia.

July 9, 1982.

Appeal from Superior Court, Hall County, A. R. Kenyon, Judge.

Phillip L. Hartley, Gainesville, for appellant.

Jeff C. Wayne, Dist. Atty., Gainesville, for appellee.

PER CURIAM.

After plenary consideration of this matter, it is found not to satisfy the criteria for the grant of certiorari, 161 Ga.App. 37, 288 S.E.2d 852, and the writ is therefore vacated.

All the Justices concur, except HILL, P. J., and SMITH, J., dissenting.

SMITH, Justice, dissenting.

This court granted certiorari in this case to determine whether the Court of Appeals erred in overruling *Love v. State*, 144 Ga. App. 728, 242 S.E.2d 278 (1978). To the recommendation that this court vacate its grant of certiorari and thereby affirm the overruling of *Love v. State*, I dissent.

Allowing the decision of the Court of Appeals in this case to stand introduces a new and dangerous concept to the role of appellate courts. In my opinion, it is clear that the court below overstepped its bounds when it overruled the *Love* case. The facts of *Love*, as well as the controlling legal principles, are entirely inapposite to the present case. A comparison of the two cases demonstrates the crucial differences between *Parker* and *Love*, and shows why

APPENDIX FOUR

CLOSING ARGUMENT BY MR. WILLIAMS:

Your Honor, at this time, the State would also cite to the Court United States Supreme Court decision, Gregg vs. Georgia, 428 U.S. 153, at page 183. In that decision, Justice Stewart wrote: "The death penalty is said to serve two principal social purposes: retribution and

deterrence of capital crimes by prospective offenders. In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct."

Ladies and Gentlemen, the Defendant has been found guilty of Murder and car stealing. As each one of you know, the State, from the very beginning, has sought the death sentence for Janice Buttrum. In that regard, under the Law of this State, you, the Jury, must find beyond a reasonable doubt that one or more aggravating circumstances applies to the Defendant in this case before you could return and recommend the death penalty. If you find that there is some aggravating circumstance about what the Defendant did, then based upon that aggravation, you could, and ought to return a verdict of capital punishment. I want each and every one of you to know and realize that if a verdict of death is returned in this case, the only person who should feel the responsibility is the Defendant herself. Because of what she did, she, in essence, signed her own death warrant. Now, Judge Pannell will Charge you what aggravating

circumstances apply to the facts that you should consider. I've written them on the board up here. You will have them out with you in the Jury Room. There are four, in number, that you should consider. First, Judge Pannell will Charge you that the offense of Murder -- one aggravating circumstance is: That the offense of Murder was committed while the Defendant was engaged in the commission of another capital felony, to-wit: Rape. Secondly: That the offense of Murder was outrageously and wantonly vile, horrible, and inhuman, and that it involved torture to the victim. Thirdly: The offense was outrageously and wantonly vile, horrible, and inhuman, in that, it involved depravity of mind of the Defendant. And finally: The offense was outrageously and wantonly vile, horrible, and inhuman, in that, it involved an aggravated battery to the victim. Those are the four aggravating circumstances that Judge Pannell will Charge you. If you find that any one of them applies, not -- you don't have to find all of them. If any one of them applies, then you would be authorized to return a verdict of capital punishment in this case. I want to go through those one at a time. First: The offense of Murder was committed while

the Defendant was engaged in the commission of another capital felony: Rape. Judge Pannell will Charge you that Rape has three elements: Carnal knowledge of a female without her consent. Carnal knowledge is defined as the penetration of the female sex organ by the male sex organ. I don't think there is any question that Demetra Faye Parker was raped. She was raped without her consent. Now, in that regard, Judge Pannell will also Charge you as to what lawyers call "Parties to a Crime". Parties to a Crime -- one is a party to a crime if he aids, abets, assists, encourages, helps another commit the crime. I think probably the best example that I could give would be if Mr. Partain and I decide to pull an Armed Robbery at a gas station down the street, I volunteer to drive and he volunteered to go in with the gun. We drive down there, I wait in the car while the engine is running, he goes in and sticks the gun in the manager's face and demands the money, gets the money, jumps in the car and off we go. Well, I didn't stick the gun in anybody's face, but under the Law of this State, I am a party to the crime. I am just as responsible for the act as Mr. Partain would have been, and is. Party

to a Crime. It is the State's contention that the Defendant in this case was a party to the rape of Demetra Parker. She encouraged it; she aided it; she assisted; helped. I think a logical deduction from the evidence is that that Defendant had oral sex with Demetra Faye Parker. She talked to Demetra Faye Parker about it that day. The conversation between Danny Buttrum and Leon Busby in which Danny said, "It will be all right as long as my wife has her first"; and then the letter, when she wrote to her husband about her bacterial infection and says, "I guess you and I both have a double dose of it now, since Demetra had it, too." She helped, she assisted, she participated in the rape of Demetra Faye Parker. Secondly: The offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved torture to the victim— torture to Demetra Faye Parker. Torture? Wasn't this a throw-back to the Middle Ages, to the times of Rome when the Christians were thrown to the lions just to watch them die? Wasn't that torture? Did Demetra Faye Parker suffer any less a fate than the Christians did from the claws and the jaws of those lions? The lions were animals

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who were starved and wanted food. That Defendant is a human that wanted blood and lust. That Defendant and her husband were humans starved for perversion. Torture? Consider what Demetra Faye Parker endured. Consider what Demetra Faye Parker went through. Think about being stabbed with a knife one time -- one time. The knife pierces your skin and enters your flesh two, two-and-a-half inches. Pain? Consider it five times. Then multiply that by twenty. Torture? Pain? Ninety-seven times Demetra endured pain and suffering -- ninety-seven times, let alone the number of times she was entered for no other reason than to satisfy their lust. Consider that she was stabbed in her genitals—her vagina. Ninety-seven times she went under that knife; ninety-seven times she felt that blade violate her body; ninety-seven times she suffered more pain; ninety-seven times she felt the indignation, the hate, and their perverted lust. Torture? Consider what she endured. If you find and believe that she was tortured, you would be authorized to return a verdict of capital punishment. Depravity of Mind: The offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved depravity of mind of the

Defendant. How else can you describe that Defendant? Depraved, sadistic, perverted. Consider that Demetra was truly a beautiful girl: consider that Demetra Faye Parker was nineteen years old. Nineteen years old, a time as wonderful and fulfilling as any in our lives. That she was raped vaginally, anally: and again, I submit to you that there was oral sex on the part of the Defendant. What does society need with such a pervert? All on a girl who was slowly bleeding to death. After having sex, they proceeded to mutilate her, to destroy any chance that she was to have to maintain life, to have a family, to taste the beauties of life that we've been able to taste. Destroyed all those chances because of their perverted desire. Finally, she did all of those things while her baby sat in the room and was a witness. Depraved? How more depraved can a human being be? Depraved -- depravity is really a weak word when you consider all that was done. Think how more depraved they could have been. What more could they have done? Can you imagine anything else that they left out? This is the ultimate crime. This is the ultimate crime which can only be punished by the ultimate punishment. Anything any less would not be adequate.

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Fourth -- excuse me. If you find that there was depravity of mind on the part of the Defendant, you would be authorized to return a verdict for capital punishment. Fourth: The offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved an aggravated battery to the victim. Judge Pannell will Charge you as to what Aggravated Battery is. Aggravated Battery is defined: When one maliciously causes bodily harm to another by depriving him of a member of the body, or by rendering a member of the body useless, or by seriously disfiguring one's body -- seriously disfiguring one's body. If that's not serious disfigurement, it doesn't exist. The decision you have to make is: life imprison, or the death penalty. We all know what a life sentence really means.

MR. FAIN: Your Honor, I would object to that comment by the District Attorney. He's aware of the Rules against such comments under the Laws of the State of Georgia.

THE COURT: Sustained.

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MR. FAIN: And, Your Honor, I would move for a Mistrial on those grounds.

THE COURT: Overruled.

(By Mr. Williams) Under the Law of this State there is no middle ground between life in prison and the death penalty. Those are your only choices: there are no others. I suppose that the question you obviously must ask yourself is: life, or death. Why should I impose capital punishment? Why would she deserve a life sentence? During the Sentencing Phase you heard several things: One, that Danny Buttrum has had problems with the Law in the past, in and out of trouble, been to the work camp a few times. Well, that's right, I'll agree. I'd stipulated that -- I would have stipulated that long ago. He's not a good person. But, we're not trying Danny Buttrum. There's been no evidence that he'd ever done anything like this before until he got with her. I submit to you that the only difference between those two is that he's had a few years head start. Within five months after she turned seventeen, she's convicted of an assault on a police officer. She's trying to catch up. She's streetwise—callous, indifferent, defies authority and could care less—streetwise. As I said

to you on Saturday, unlike any eighteen-year-old female you or I have ever met or ever seen. Again, as I said to you before, I submit that there are two Janice Buttrums: One that you've been able to look at and see throughout this trial, and one who is a deviant pervert, a murderer, and a butcher. Do not be fooled by a pretty backdrop. You heard about what a terrible background she came from. Well, there are literally thousands and millions of people who have come from poor, bad backgrounds who have become good, solid, law-abiding people. You and I both know some. That is no excuse for murder, and rape, and a blood bath on a nineteen-year-old girl. Pillars of the community don't commit brutal murders and participate in sadistic rape rituals. The lawyers want you to feel sorry for her. But, you stated at the very beginning that you believe in capital punishment and that you could return a death verdict against a female. Consider this: How bad does a case have to be before you can return a death verdict against her? How bad does it have to be? Can you imagine anything any worse than what you have heard in this case? Consider who was leading who. Who was the

worst of the two? Was she coerced into this? Was she really afraid of her husband? She stabbed first; she continued to stab her; she stabbed most; she went to the door, knocked, and tricked Demetra into opening the door. She was the one that went around, did all the talking, looking for money to get away. She was the one wearing Demetra's jewelry, pillaged from that victim's body. In regard to what happened that night, recall that Danny made the statement: "It will be all right as long as she could have her first." Recall the letter in which she said, "Now, Danny, you and I both have a double dose of that infection." Recall that she asked Demetra in an indirect way about what she thought about going to bed with other girls. Ladies and Gentlemen, a reasonable deduction based on that wild, perverted sexual activity that night is that Janice did, in fact, get her. Consider that in Florida she wrote out that check on Demetra's account. She was the one that wanted to kill Demetra. She has continued to wear some of Demetra's clothing. She is the one that wanted to stab Demetra in the heart. She was the one who slashed Demetra across the stomach because, quote, "There was no other place to stab." And finally, in her letter she

owned up and took the blame. Said all those things to all those people at the time of her arrest and since that time, until yesterday. Coerced? Afraid? Did she ever ask Danny to stop? Did she ever leave? No. Someone who is coerced and someone who is afraid of someone else to the point of committing a crime is not the one who executes the plan, who does the first criminal act of stabbing, who does most of the stabbing, who makes all the arrangements to get away, and then after the arrest and being driven back to Dalton three days later, says she doesn't feel a bit sorry for killing that girl. Again, listen to her words and consider her actions, look at the words from her own hand: "Did most of the stabbing"; "That girl just didn't want to die"; stabbed in the vagina; cut her across the stomach, "Because that was the only place left to cut"; "I don't feel a bit sorry for killing the girl". Yes, she is eighteen now and from a bad background. But, as I said a moment ago, she is unlike any other eighteen-year-old female you or I have ever met. Dangerous. Yes, she's got children, but no matter what happens, she will be separated from those children whether she gets life or death; and frankly, those children will be much better

off without her. Potentially, could do it again. And yes, she's female, but Demetra Faye Parker is just as dead as she would have been had she first been stabbed, and stabbed mostly by a man. Finally, you've been asked to feel sorry for Janice Buttrum. Does Janice Buttrum feel sorry for anybody else? Did she ever express any regret for Demetra Parker? Did she ever express any remorse for her acts? Did she ever express any sorrow for Demetra's death? It's been one year ago tomorrow night—Tuesday night—that this occurred, and only yesterday did she make any outward and open statement of any sorrow, when she was in that seat in front of you fourteen. How can we feel any sorrow for her, when she cares less about us? Never a word of regret, not the first "I'm sorry". Who will be next? You? Your wife? Your daughter? Consider lack of remorse, until face-to-face with fourteen people. Consider who was really leading who? Who did all the action? Consider who was the real worst of the two. Demetra's life meant nothing. Did you hear anything that would indicate she felt bad about her acts, until yesterday--one year, almost to the day, from the crime. She has no more respect for you and this Court than she did for Demetra Faye Parker in the early morning hours of September the 3rd. Now, reasons for

capital punishment. You probably have some; there are a lot of reasons. I want to name a few. There are some people in this Country who do not believe in capital punishment for one reason or another; but there is at least one person we all know who leaves no question about her stand on capital punishment, and it's that Defendant right there—the Murderer herself. Janice Buttrum has sat here during this entire trial wondering to herself whether your views of capital punishment are the same as hers. Capital punishment is the ultimate punishment reserved for the ultimate crime. This was not a bar room shooting; this was not a land line fight; this was not a shootout over a still. Any less a punishment would not be adequate. This is the ultimate crime. Crimes don't get any worse than this one. You will never hear of a single other solitary murder that is in -- any worse than this one. There are just certain heinous and horrible crimes committed for which the just, and only just, sentence is that of death. In those cases, the Defendant simply demonstrates that she is no longer capable of living in a human society, and she simply forfeits her right to live and breathe. Society needs the death sentence, Ladies and Gentlemen,

to express its moral outrage at such offensive conduct. A society that does not have a punishment that fits the crime will soon become regarded by its members as not caring as to their behavior. If we don't care about other's behavior, how can we expect to deter others from committing similar crimes? Now, I know that there are many people that say that capital punishment does not deter, but I ask you: What does good old common sense tell you? That it does. They say that you can't prove that capital punishment deters anyone, that it keeps anyone from committing a murder, that it saves any lives. Well, it's like the lighthouse. I'd equate it to the lighthouse that's built out on the reef. Because that lighthouse is there, ships are able to avoid that reef. There is no way of knowing how many ships avoid that reef, how many lives are saved. But, you and I know that because that lighthouse is there and it functions, that ships are saved, that ships are able to pass. It is the same thing with capital punishment. There is no way of knowing how many lives have been saved because capital punishment is the Law of Georgia. Common sense tells us that it has. You know, capital punishment is really nothing more than the ancient and

honored Law of self defense. It enables society to defend itself against totally unwarranted, unjustified, unprovoked, horrible attacks upon us as individuals. Those are just some of the reasons for capital punishment. You may know of others. I think, though, that our moral values would seem to be twisted if the murderer is always spared, while the victim's death is irrevocable. What about the victim? What about Demetra Parker? We've heard all about that Defendant's problems. Focus a moment on Demetra Faye Parker. Compare her to the murderer. Compare her plight to that of the murderer's. Oftentimes, we, the public, are treated to bales of propaganda to bring about sympathy for murderers, but never a kind word for their victims. Many criminals escape punishment; no victim ever does. Look at Demetra; look at the Defendant. She summarily, slowly, surely murdered and participated in the rape of Demetra Faye Parker without any due process of Law. Demetra Faye Parker had no lawyers; Demetra Faye Parker had no public hearing; Demetra Faye Parker had no right to counsel; Demetra Faye Parker had no verdict based upon Law. There sits her Judge, there sits her Jury, and there sits her executioner. There ain't no doubt what that

Defendant, that murderer, thinks about capital punishment. She has no right to expect any more of Demetra Faye Parker than she does of herself; and you know what she thinks about the death penalty. If she can subject Demetra Parker to it as a criminal act without due process of Law, then she can certainly expect herself subjected to it with due process of Law. No longer should an innocent victim be required to suffer a punishment greater than that of her murderer. Ladies and Gentlemen, at the beginning of this case during voir dire, you told me that you were not opposed to capital punishment, that you would consider it. You took an oath at the beginning of the case. You said, "I do", to "You shall well and truly try the issue formed upon this Bill of Indictment between the State of Georgia and Danny Buttrum (sic), who is charged with" -- "Janice Buttrum, who is charged with Murder and Theft By Taking, and a true verdict give according to evidence. So Help You God." "According to evidence"; not according to mercy, not according to sympathy, not according to feeling sorry for a Defendant. If you want to feel sorry for somebody, feel sorry for those people. (Indicating) Mercy? I submit to you that

we should have no sympathy with that sentiment that springs into action whenever a criminal is about to suffer for a crime. Society demands that the crime be punished and criminals warned. The false humanity that starts and shutters when the ax of justice is about to fall is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal. But, we must insist upon mercy to society, upon justice to the poor girl whose blood cries out from her grave for her murderer. That criminals go unpunished is a disgrace to our civilization and we have reaped the fruits of it in the frequency with which the bloody acts occur. A stern, unbending, unflinching administration of justice is the surest way to prevent the commission of other heinous and horrible acts like the one committed by that Defendant. We are a society of Laws, not of sentiment. As I said a moment ago, if you have sentiment, feel for the soul of Demetra Parker. Give mercy to Ray Parker. Feel sorry for him, for he has suffered and he continues to suffer. May he walk from the Courtroom and this Courthouse with his head held a little higher. Give him peace. Mercy? What mercy did that Defendant give Demetra Parker? Mercy on an eighteen-year-old female? Do you have qualms for capital punishment on an eighteen-year-old female? Why don't you ask Janice Buttrum what she thinks about capital

punishment on young, teenage females? You have to look no farther than to the photograph of Demetra spread-eagle on the floor of a motel room. God save us all from Janice Buttrum. God save us all from the butchering mutilation of human flesh. God save us all from demoralizing indignation of a brutal rape. May Janice Buttrum never again haunt society. During the three-and-a-half days of voir dire, Mr. Fain and Mr. Brown talked to you about your church affiliation, view— religious views on capital punishment. Of course, we all know what, in the Old Testament, the Commandment "Thou Shalt Not Kill", "An Eye for an Eye", and so on. I found it interesting in Paul's letter to the Romans, Chapter 13, 1 through 4, where he wrote: "Let every person be subject to the governing authorities for there is no authority, except from God, and those that exist have been instituted by God. Therefore, he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good and you will receive his approval. For he is God's servant for your good, but

if you do wrong, be afraid. For he does not bear the sword in vain. He is the servant of God to execute his wrath on the wrongdoer. Also in the New Testament, in Luke, Chapter 23: Luke describes the scene around Calvary. Do you recall, he wrote that two robbers were crucified on either side of Christ. One of the criminals who were hanged, railed at him saying: "Are you not the Christ? Save yourself and us." But the other rebuked him saying, "Do you not fear God since you are under the same sentence of condemnation? And we indeed justly for we are receiving the due reward of our deeds." And he said, "Jesus, remember me when you come into your Kingly power." And Jesus replied, "Truly I say to you, today you will be with me in paradise." Don't you know that Christ, had he wanted, could have summoned a dozen angels to spare his body and the bodies of those two robbers on the cross? He did not. He spared their souls, but not their bodies. Ladies and Gentlemen, as I said earlier, it is she, the Defendant, that has signed her own death warrant; she, herself, has brought these proceedings down about her. No one -- no one else, including you,

should feel any responsibility for what happens to her, for it is she that has caused us all to be here today, for it is she that broke into that room that night by trick, for it is she that participated in the rape over and over again of Demetra Parker, for it is she that helped stabbed Demetra Parker ninety-seven times, for it is she that left her in that condition with that toothbrush holder in her vagina, for it is she that left her there to die, for it is she that has brought her whole world crumbling down about her, and that it is she that has, in reality, signed her own death warrant. She is responsible for her acts. Now, she is responsible for her death, no one else. You are a group; you are not simply fourteen individuals. Do not consider that any one of you is throwing the switch. You are merely one cog in the criminal process.

MR. FAIN: (Interposing) Excuse me. Your Honor, I apologize for interrupting Mr. Williams, but that is contrary to the Laws of the State of Georgia to argue that these people should take less than total, and full, and individual responsibility for what they do. And

I feel that it's improper argument. And the Laws of this State are contrary to what Mr. Williams is stating, and I would object to that and move for a Mistrial on those grounds.

THE COURT: Overrule your objection; and overrule your Motion for Mistrial.

(By Mr. Williams) You have strength in numbers. I ask you to brand her "butcher", to give strength to our Laws, and to return a verdict that we all know will tell others that the people of this County are strong. We will not tolerate savages acting like cannibals, butchering and raping innocent teenage girls. That Defendant is guilty, and there is but one punishment suitable for her crime--capital punishment. With my hopes and those of all who are here, I give you this case.

THE COURT: All right, we're going to take about fifteen minutes. Let the Jury go to the Jury Room. Now, it's even more important now, you should not discuss the case, even among yourselves until I've Charged you to deliberate.

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85-7071

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JANICE MARIE BUTTRUM,

Petitioner,

v.

GARY BLACK, WARDEN,
MIDDLE GEORGIA CORRECTIONAL
INSTITUTION, WOMEN'S DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

RESPONSE IN OPPOSITION TO THE GRANTING
OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether the state habeas corpus court properly inquired as to whether or not the prosecutor's argument diminished the jury's sense of responsibility or denied the Petitioner fundamental fairness in accord with the decision of this Court in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985)?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Janice Buttrum, was indicted in the Superior Court of Whitfield County, Georgia during the July Term, 1980, for the murder of Demetra Faye Parker and the theft of Ms. Parker's motor vehicle. Petitioner was tried by a jury and found guilty of both offenses. Petitioner was sentenced to death for the murder of Demetra Faye Parker, the jury having found two statutory aggravating circumstances to exist, i.e., those statutory aggravating circumstances contained in O.C.G.A. § 17-10-30(b) (2) and (7). On direct appeal to the Supreme Court of Georgia, Petitioner's convictions and sentenced were affirmed. Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982). This Court denied Petitioner a petition for a writ of certiorari on January 17, 1983. Petitioner's petition for rehearing filed in this Court was denied on March 21, 1983.

Next, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Baldwin County, Georgia. Following an evidentiary hearing, the Superior Court of Baldwin County, Georgia denied Petitioner state habeas corpus relief on

December 17, 1985. Petitioner's application for a certificate of probable cause to appeal filed in the Supreme Court of Georgia was denied on March 11, 1986. This petition for a writ of certiorari follows.

The facts presented at trial established the following:

Nineteen year old Demetra Faye Parker was savagely raped, sodomized and stabbed ninety-seven times in her motel room at the Country Boy Inn, in Whitfield County, Georgia, during the early morning hours of September 3, 1980. Demetra Parker had lived in Tennessee, but had come to Georgia to be near her boyfriend. On the evening before her death, September 2nd, Ms. Parker arranged to meet two friends. (T. 512, 1519). Ms. Parker and her companions spent approximately two hours together at Demetra's motel room watching television. During this visit, Petitioner's husband, Danny Buttrum, was observed pacing back and forth approximately fifteen to twenty times outside Ms. Parker's room. (T. 1513, 1516, 1520). Ms. Parker told her friends that she was fearful of Mr. Buttrum and they locked the door. At approximately 8:30 p.m. Ms. Parker drove her guest home. (T. 1513-1514, 1520).

Christopher Busby lived at the Country Boy Inn during August and September of 1980. Petitioner and her husband also had a room, Room No. 243, at the same motel. (T. 1539, 1540, 1549, 1624). Mr. Busby and Mr. Buttrum visited with each other during Tuesday, September 2, and drank a beer together. During this time, Ms. Parker drove Petitioner to the store and to the laundromat. (T. 1417, 2046, 2059).

At approximately 7:00 p.m., Mr. Buttrum, Petitioner and their baby, along with Mr. Busby, left the motel to purchase beer. (T. 1514, 1552). The three adults and the child drove around in Mr. Busby's blue and white Ford Torino and tried to "get him a girl" at Danny Buttrum's request. (T. 1539, 1544). When questioned if Petitioner would become angry, Mr. Buttrum stated, "No, as long as she gets to go with her first." (T. 1395, 1544).

Female witnesses testified that Mr. Buttrum came to visit them during the late evening hours of September 2, 1980 and that they observed a woman seated in the back of the car. Danny Buttrum was unable to make arrangements with any of the women and returned to the motel with Petitioner, their child

and Mr. Busby. (T. 1546, 1570-1572, 1578, 1598). Mr. Busby then loaned Mr. Buttrum his car, which was returned at approximately 3:45 a.m. on September 3, 1980. (T. 1546, 1547).

During the early morning hours of September 3, Petitioner and her husband went to Ms. Parker's room, No. 253, at the Country Boy Inn in Dalton, Georgia. (T. 1394, 1435, 1624-1625). Petitioner, while holding her baby, knocked on Ms. Parker's door and when Ms. Parker answered, the couple rushed inside. While Mr. Buttrum struggled with Ms. Parker's Petitioner adjusted the lights and closed the door. (T. 1394, 2049, 2090).

Petitioner began to stab Ms. Parker with a Barlow brown and white knife after Mr. Buttrum wrestled the victim to the ground. (T. 1436, 2092, 2106). Petitioner repeatedly stabbed Ms. Parker, whereupon, Petitioner's husband took the knife and continued the attack. (T. 1394, 1436, 2104). While Mr. Buttrum and Petitioner were stabbing Ms. Parker, Petitioner's husband was masturbating. (T. 1436). When Ms. Parker refused to die, Petitioner cut her across the stomach to kill her, "because it was the only place to cut," and "that girl sure didn't want to die." (T. 1394, 1436).

As a final sadistic touch, Petitioner's husband picked up a cylindrical toothbrush holder and pushed it into Ms. Parker's vagina. (T. 2052). Only then did Petitioner and Mr. Buttrum pick up their child from the motel room floor, along with Ms. Parker's ring and pocketbook and finally leave the room. (T. 1436). Petitioner and her family returned to their motel room to wash off Ms. Parker's blood. They then fled in Ms. Parker's 1975 Buick Rivera. (T. 1436, 2100).

Dr. James Metcalfe, Associate Pathologist at Hamilton Memorial Hospital, performed the autopsy on Demetra Parker. (T. 1380, 1451-1453). Ms. Parker was 5'8 1/2" and weighed approximately 100 lbs. She incurred sixty-seven stab wounds to her left chest with a maximum depth of 2". The blade penetrated several ribs and her left lung. Dr. Metcalfe

observed twenty-four stab wounds and cuts in the front neck area with several cuts to the windpipe. (T. 1451-1456). Spinal stab wounds were 2" deep and cut into the backbone. A gapping gash had been inflicted to ms. Parker's lower abdomen, exposing her bowels. (T. 1456). Ms. Parker suffered a 4" cut in the genital area, as well as damage to the vagina and rectum from forcible penetration. (T. 1456, 1459, 1473). Hemorrhages and bruise marks were observed on Ms. Parker's scalp, nose, knees and genital region. (T. 1457). Finally, there was a 1 to 1 1/2 bite mark on her neck. (T. 1457, 1467).

Dr. Metcalfe stated that the vast majority of injuries around the vagina and anus occurred while Ms. Parker was alive. (T. 1468). Ms. Parker died only after the attack or at the very end of the prolonged assault. (T. 1469). The stab wounds to the chest and neck finally resulted in her death. (T. 1467-1468).

Special Agent Charles Johnson of the Georgia Bureau of Investigation investigated the murder. (T. 1373-1374). He found bloody towels, panties and other items in Ms. Parker's room. (T. 1375). Mr. Chambracant Patel, the manager and owner of the Country Boy Inn, informed investigators that he had discovered Ms. Parker's body. (T. 1610). Mr. Patel also found the key to Petitioner's room on the motel front desk and after investigating, determined that Petitioner had abandoned her room. (T. 1609, 1612). Mr. Patel admitted investigators to Petitioner's empty room. (T. 1377). A bar of soap and a pink washcloth both covered with blood were found in the sink of Petitioner's room. (T. 1377-1378).

Forensic Serologist Connie Pickens examined the evidence and a blood sample from Demetra Parker. (T. 1476-1479). Ms. Parker had Type O blood, which was the same type of blood as the blood stains found on the physical items of evidence including the pink washcloth in Petitioner's abandoned room. (T. 1479-1480, 1485). Forensic Serologist John Wiegel, Jr. found the blood enzymes on the pink washcloth to be consistent with Ms. Parker's blood enzyme makeup. (T. 1493-1502).

At approximately 5:00 a.m. on September 3, Petitioner, her husband and child drove to the truckstop where Mr. Buttrum worked. (T. 1592). Petitioner attempted to borrow money but was unsuccessful. (T. 1592). Petitioner was finally able to get $20.00 from the truckstop manager. (T. 1598-1603). Petitioner stated, "I don't know if you know what's going on or not, but we're in a hurry. And if Mr. Teems or anyone ask you, you have not seen us." (T. 1602-1603).

Special Agent Willard Dodd of the GBI contacted Petitioner's mother-in-law on Wednesday, September 3. Mrs. Buttrum had given the couple money at approximately 6:00 a.m. that morning. (T. 1421-1423). Petitioner contacted Mrs. Buttrum by telephone the following morning from Pensacola, Florida, requesting that more money be wired to the local Western Union Office in Florida. (T. 1425). Petitioner and her husband were arrested on September 4th in Pensacola as they attempted to pick up the money that had been wired to them. (T. 1428-1431). Petitioner gave the ring and barrette that she had taken from the victim to Agent McFaul. (T. 1436-1437, 1422). Petitioner stated, "Should you feel some remorse when you kill somebody?" because she said she did not feel anything. (T. 1417). Petitioner was advised of the Miranda warnings and signed a waiver form. (T. 1434-1436, 1616-1621, 1624-1625). Petitioner thereafter read and signed her confession. (T. 1622-1623, 1625).

Whitefield County Sheriff's Department jailer John Parker received a letter written by Petitioner while she was incarcerated requesting that the communication be given to the proper authority. (T. 1632-1646). Petitioner wrote that she killed Demetra Parker as an unwarranted act of jealousy and that she made her husband do everything he did, including the rape of Demetra Parker. (T. 1644).

Petitioner did not testify during the guilt/innocence phase of her trial. The jury found Petitioner guilty of murder and theft of a motor vehicle. (T. 1770). During the sentencing

phase of the trial the defense attempted to establish Petitioner's impoverished childhood background, replete with neglect, victimization by her stepmother, and non-existent home hygiene. (T. 1937-1982). Petitioner was characterized as being non-violent, passive, withdrawn and having a low self-image. (T. 1979, 2005, 2017). Witnesses testified, however, that the observations attested to were based on familiarity with Petitioner during 1977 and from Petitioner's early elementary school years. (T. 1950-1951, 1961, 1968, 1982, 2000). Furthermore, one witness stated that not many neglected children commit murder and that many children in similar situations lead good lives. (T. 1942, 1947). When questioned about Petitioner's capacity to commit such a crime, Unit Director of the Bartow County Juvenile Court, Wanda Holstein, stated, "I would have to do more of a study of what's happened in Janice's life since I worked with her." (T. 1997). Petitioner was characterized as an individual who "would make decisions that would give her the most pleasure, without really giving any consideration to the consequences." (T. 2080).

Petitioner testified during the sentencing phase of her trial that her husband would do anything when he had been drinking. (T. 2041). Petitioner admitted stabbing the victim because she was hurt and angry. (T. 2051). Petitioner denied having oral sex with the victim and also testified that the letter she had written while in jail was not true. (T. 2055, 2088). Petitioner alleged that she did not remember making the statement she had made to the authorities. (T. 2098).

Clinical psychologist Henry Adams testified at trial that Petitioner has an anti-social personality as well as symptoms of paraphilia sexual sadism. (T. 1804, 1822, 1835). This type of individual becomes excited by the suffering, humiliation and pain of the victim, especially from a non-consenting

individual. (T. 1814-1816). Dr. Adams further testified that the behavior was a repetitive type of activity that continues until the person is apprehended or stopped in some way. (T. 1822-1823).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

THE PROSECUTOR'S ARGUMENT DURING THE SENTENCING PHASE OF THE PETITIONER'S TRIAL DID NOT DENY PETITIONER FUNDAMENTAL FAIRNESS.

In this petition for a writ of certiorari, Petitioner claims that the state habeas corpus court failed to apply the appropriate standard of review in denying Petitioner's state habeas corpus relief with respect to her claim that the argument of the prosecutor during the sentencing phase allegedly violated Petitioner's constitutional rights. Specifically, Petitioner contends that the standard applied by the state habeas corpus court was not in accordance with the standard articulated by this Court in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985).

Respondent submits that the state habeas corpus court properly made an inquiry as to whether the prosecutor's arguments denied Petitioner a fundamentally fair trial and that the analysis utilized by the state habeas corpus court is the same analysis which was utilized by this Court in Caldwell v. Mississippi, supra. Respondent submits that Petitioner was not denied her right to a fundamentally fair trial and therefore, the principles set forth by this Court in Caldwell v. Mississippi, supra, were not violated due to the prosecutor's arguments in this case.

The state habeas corpus court found the following with reference to the prosecutor's argument at the sentencing phase:

> This Court has closely examined the closing argument of the prosecutor at the sentencing phase of the trial and concludes that said argument did not introduce the "passion, prejudice or other arbitrary factors"

> proscribed by O.C.G.A. § 17-10-35(c)(1), nor did it diminish the jury's sense of responsibility or deny the Petitioner fundamental fairness.

(Petitioner's Appendix 2, p. 10). Respondent submits that this analysis of the validity of the prosecutor's closing argument was in full accord with the decision of this Court in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985).

In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the standard for reviewing prosecutor's argument emerged so as to focus on whether the complained of comments by the prosecutor rendered a defendant's trial fundamentally unfair. Donnelly v. DeChristoforo, supra, at 642. Also in Donnelly v. DeChristoforo, supra, this Court provided further important guidelines for reviewing allegedly improper prosecutorial arguments. Of primary importance is the need to examine the entire context of the judicial proceeding, so as to determine if the argument rendered the entire trial fundamentally unfair.

In Caldwell v. Mississippi, supra, this Court utilized the language of the "harmless beyond a reasonable doubt test of Chapman v. California, 386 U.S. 18 (1967), in evaluating the impact of the prosecutor's remarks made during the closing argument on the sentencing phase of a death penalty case. Respondent respectfully submits that this Court's decision in Caldwell v. Mississippi, supra, is a case which is fact specific and establishes no new standard of general applicability in reviewing claims of alleged prosecutorial misconduct. Rather, the analysis utilized by this Court in Caldwell v. Mississippi, supra, was also essentially a determination of whether the prosecutor's argument had rendered Petitioner's trial fundamentally unfair.

This Court focused on several factors in making this determination. First, this Court in Caldwell found that the prosecutor's comments during closing argument were clear and

unambiguous. Second, this Court noted in Caldwell v. Mississippi, supra that comments of the prosecutor impacted directly upon the defendant's Eighth Amendment right to the responsible and reliable exercise of sentencing discretion by a sentencer who had been improperly led to believe that its decision was not the final decision. Third, this Court noted that the prosecutor's clear and unambiguous improper comments made during sentencing were buttressed by the trial court's comments to the jury. Finally, this Court noted in Caldwell that in that particular case there was an absence of any clarifying instructions from the trial court to the jury concerning the proper exercise of the jury's discretion as to sentencing. Because of the presence of each of these factors and their cumulative effect, this Court concluded that it could not be said that the presence of these factors ". . . had no effect on the sentencing decision." Id. at 2646.

Recently in Darden v. Wainwright, No. 85-5319 (U.S. June 23, 1986), this Court, in reviewing a prosecutor's argument during the guilt/innocence phase, while examining its prior decision in Caldwell v. Mississippi, and noted that the principles of Caldwell apply to situations which involve comments by a prosecutor during the sentencing phase of a trial to the effect that jury's decision the jury's decision as to life rested death was not final, that the jury's decision would automatically be reviewed by the state supreme court and the jury should not be made to feel that the entire burden of the defendant's life was on them. Darden v. Wainwright, supra, slip. Op. at p. 14, fn. 15. This Court noted that, "Caldwell is relevant only to certain types of comments - those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Id. This Court found in Darden v. Wainwright, supra, that none of the comments made by the prosecutor in argument in that case could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. Id.

Similarly, Respondent submits that the state habeas corpus court made such an inquiry in rejecting this argument made by Petitioner. The Court properly found that there were no comments that had this improperly misleading effect. The state habeas corpus court's analysis as to whether the prosecutor's argument diminished the jury's sense of responsibility is clearly the same analysis as was applied by this Court in Caldwell v. Mississippi, supra.

Petitioner contends that the prosecutor's argument was misleading in several respects. First, Petitioner contends that the jury was repeatedly told that it should not feel any responsibility for a verdict of death as the responsibility for such a sentence lay only with the Petitioner. Petitioner cites his fourth appendix to this petition at pages 2 and 20-21. An examination of the argument made by the prosecutor in the context of the argument as a whole reveals that the argument did not diminish the jury's responsibility for a death sentence. The first reference to the closing arguments made by Petitioner attacks this language, "I want each and every one of you to know and realize that if a verdic. of death is returned in this case, the only person who should feel the responsibility is the Defendant herself. Because of what she did, she, in essence, signed her own death warrant." (Petitioner's Appendix 4, p. 2). Respondent submits that viewed in context this statement was not misleading. This statement was at the beginning of the prosecutor's closing argument during sentencing in which the prosecutor began by telling the jury that capital punishment was an expression of society's moral outrage at particularly offensive conduct. The prosecutor then argued that the jury would have to find whether statutory aggravating circumstances existed beyond a reasonable doubt and that if there were statutory aggravating circumstances, he urged the jury to return a verdict of capital punishment. The prosecutor then made the statement now assigned as error. The statement was essentially an argument

that Petitioner's own conduct authorized the death penalty, rather than a statement that the jury should not feel responsible for imposing the death sentence, as the prosecutor had just stressed that it was the jury's responsibility to determine if statutory aggravating circumstances existed and if so, whether a sentence of death should be returned. (Petitioner's Appendix 4, p. 2). This comment did not mislead the jury.

Next, Petitioner attacks that portion of the prosecutor's argument that states, "do not consider that anyone of you is throwing the switch. You are merely one cog in the criminal process." (Petitioner's Appendix 4, p. 21). This second remark which is alleged to diminish the jury's sense of responsibility, was made near the end of the prosecutor's closing argument. The portion of prosecutor's closing argument immediately preceding the objected to remark reads as follows:

> Ladies and Gentlemen, as I said earlier, it is she, the Defendant, that has signed her own death warrant; she, herself, has brought these proceedings down about her. No one -- no one else, including you, should feel any responsibility for what happens to her, for it is she that has caused us all to be here today, for it is she that broke into that room that night by trick, for it is she that participated in the rape over and over of Demetra Parker, for it is she that helped stabbed (sic) Demetra Parker ninety-seven times, for it is she that left her in that condition with that tooth brush holder in her vagina, for it is she that left her there to die, for it is she that has brought

her whole world crumbling down about her, and it is she that has, in reality, signed her own death warrants. She is responsible for her acts. Now, she is responsible for her death, no one else.

(Petitioner's Appendix 4, p. 20-21).

This argument of the prosecutor was made in direct response to both argument and evidence presented on behalf of Petitioner. Petitioner was a 19 year old girl who had allegedly lived a chaotic and crisis-filled life and had allegedly come from poverty-stricken circumstances. Petitioner's attorneys' were seeking to invoke the jurors' feeling of sympathy for Petitioner in order to avoid the death sentence. Additionally, Petitioner committed these crimes along with her husband, Danny Buttrum and it was alleged by both argument and evidence presented on Petitioner's behalf, that Petitioner had only participated in these crimes in order to aid her husband and at his initiation. Petitioner's attorneys were attempting to establish that Petitioner was a follower and that she would have never participated in any way in these crimes, but for the influence of her husband upon her. Therefore, the prosecutor was arguing that Petitioner was responsible for her own actions and that no one, including her husband, had forced her to do any of the acts which had been established by the evidence presented for the state. The prosecutor was arguing that Petitioner should be held responsible for her actions, and that the jurors should not exercise their authority to spare Petitioner's life when her own actions supported the imposition of the death sentence.

Viewed in the context of the evidence presented at trial, especially the argument and evidence presented on behalf of Petitioner trying to establish that she was less than a full participant in all the crimes, this argument did not violate the principles set forth by this Court in Caldwell v. Mississippi, supra.

Petitioner also cites several other portions of the prosecutor's argument as being improper. Specifically, Petitioner contends that the prosecutor relieved the jury of its duty and responsibility to judge the appropriate sentence to be imposed, by telling the jury that the only just sentence was the death sentence. Viewed in context, these remarks were not improper. The prosecutor was arguing that Petitioner's acts showed depravity of mind and that this was the ultimate crime which should be punished by the ultimate punishment, anything less being inadequate. (Petitioner's Appendix 4, p. 7). The prosecutor was simply arguing that aggravating circumstances were established by the evidence that was presented so as to authorize the sentence of death. This is, of course, the purpose of the prosecutor's argument at the sentencing phase and to disallow such argument would be to eliminate the prosecutor's ability to seek the death sentence.

Petitioner contends that the prosecutor's argument impermissibly compared Petitioner's life to that of the victim, but an examination of the pages cited by the Petitioner establishes that the prosecutor was arguing that the Petitioner should receive the same type of "justice," that she had afforded her victim, i.e., "capital punishment". There was no comparison of the worth of the lives of the Petitioner and the victim and this argument was not improper and certainly did not render the sentencing process fundamentally unfair. (Petitioner's Appendix 4, p. 16).

Petitioner contends that the prosecutor violated Petitioner's constitutional rights because the prosecutor informed the jury that it was not proper to consider mercy or sympathy in reaching its decision. Respondent submits that the prosecutor appropriately argued that the jury should not return a life sentence because they felt sorry for the Petitioner but rather should base their verdict "according to the evidence," "not according to sympathy, not according to feeling sorry for a defendant." (Appendix 4, p. 17). Again, this was in direct

response to the attempt on the part of Petitioner's attorneys by argument and evidence to avoid the death sentence based on sympathy for Petitioner as a 19 year old juvenile delinquent from a broken home and poverty-stricken circumstances.

Finally, Petitioner objects to the comment of the prosecutor that, "We all know what a life sentence really means." (Appendix 4, p. 8). This statement was objected to and sustained by the trial court. (Appendix 4, p. 8-9). Then the prosecutor clarified this argument as being that there was only one question, whether or not Petitioner deserved life or the death penalty, i.e., that there was no middle ground between life imprisonment and the death penalty. (Appendix 4, p. 9). Therefore, viewed in the context of the whole argument of the prosecutor, and due to the trial court's sustaining of Petitioner's attorney's objection to this remark, Respondent submits that Petitioner cannot establish that the jury's sense of responsibility was diminished by virtue of this statement.

Simply stated, Respondent submits that the habeas corpus court properly applied the same test utilized by this Court in Caldwell v. Mississippi, supra, as further defined by this Court's recent decision in Darden v. Wainwright, supra, and that the prosecutor's remarks during the sentencing phase, viewed in the context of the trial as a whole did not have the effect of misleading the jury into thinking that it had a reduced role in the sentencing process.

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that this Court deny this petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, SUSAN V. BOLEYN, a member of the Bar of the Supreme Court of the United States and counsel of record for the Appellee, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of Response in Opposition to the Granting of the petition for a writ of certiorari upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

Mr. George H. Kendall
88 Walton Street, N.W.
Atlanta, Georgia 30303

Bruce S. Harvey
712 Peachtree Center
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Dalton, Georgia 30720

This 9th day of July, 1986.

Susan V. Boleyn

SUSAN V. BOLEYN
Senior Assistant
Attorney General

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JANICE MARIE BUTTRUM,

Petitioner,

v.

GARY BLACK, WARDEN,
MIDDLE GEORGIA CORRECTIONAL
INSTITUTION, WOMEN'S DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

CERTIFICATE OF MAILING

I, SUSAN V. BOLEYN, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day deposited in the United States mail with proper address and adequate postage to the Clerk of the Supreme Court of the United States, and that three copies of said brief are being properly mailed to counsel for the Petitioner.

This 9th day of July, 1986.

Susan V. Boleyn

SUSAN V. BOLEYN
Senior Assistant
Attorney General
Counsel of Record for the
Respondent.

Sworn to and subscribed before
me this 3rd day of July, 1986.

Becky Hughes

NOTARY PUBLIC

Notary Public, Georgia State at Large
My Commission Expires Nov. 16, 1988

SUPREME COURT OF THE UNITED STATES

JANICE MARIE BUTTRUM *v.* GARY BLACK, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 85–7071. Decided October 14, 1986

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting from denial of certiorari.

Petitioner was convicted of murder and sentenced to death. Her conviction and sentence were affirmed on direct appeal, and this Court denied certiorari. *Buttrum* v. *State*, 249 Ga. 652, 293 S. E. 2d 334 (1982), cert. denied, 459 U. S. 1156 (1983). The present petition seeks review of a subsequent denial of state habeas corpus relief in state court. Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Georgia insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would, at the very least, delay the disposition of this petition until *California* v. *Brown*, No. 85–1563, is decided.

I

In closing argument at the sentencing phase of petitioner's trial, the prosecutor incorporated statements from an 1873 decision of the Georgia Supreme Court that appears with some regularity in contemporary capital sentencing proceedings in that state. See *Eberhart* v. *State*, 47 Ga. 598, 609–610 (1873); *Ruffin* v. *State*, 243 Ga. 95, 105, 252 S. E. 2d 472, 479–480 (1979). The effect of these statements was to lead the jury to believe that mercy was not a permissible component of their sentencing determination:

> "You took an oath at the beginning of this case. You said, 'I do', to 'You shall well and truly try the issue formed upon this Bill of Indictment . . . and a true verdict give according to the evidence. So help you God.' 'According to the evidence'; not according to mercy, not according to sympathy, not according to feeling sorry for a Defendant. . . . Mercy? I submit to you that we should have no sympathy with that sentiment that springs into action whenever a criminal is about to suffer for a crime. Society demands that the crime be punished and criminals warned. The false humanity that starts and shudders when the axe of justice is about to fall is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal. . . . A stern, unbending, unflinching administration of justice is the surest way to prevent the commission of other heinous and horrible acts like the one committed by that Defendant. We are a society of Laws, not of sentiment." App. to Pet. for Cert. A–4, pp. 17–18.

On more than one occasion, the Georgia Supreme Court has condemned use of the statements employed by the prosecutor in petitioner's sentencing hearing—at least where they are attributed to a Justice of that court—though it has generally found their effect insufficiently prejudicial to war-

rant reversal of the death sentences imposed. See, *e. g.*, *Ruffin*, *supra*, at 105, 252 S. E. 2d, at 479–480; *Hawes* v. *State*, 240 Ga. 327, 335–336, 240 S. E. 2d 833, 840 (1977). The Court of Appeals for the Eleventh Circuit has rejected use of this same language, regardless of the spokesman, because its content does not relate to the particular circumstances of the defendant whose sentence is being determined, but rather implies that considerations of mercy can have no part in jury deliberations in capital sentencing proceedings. See, *e. g.*, *Wilson* v. *Kemp*, 777 F. 2d 624, 626–628 (1985), cert. denied, —— U. S. —— (1986); *Drake* v. *Kemp*, 762 F. 2d 1449, 1458–1461 (1985), cert. denied, —— U. S. —— (1986). These divergent opinions from the Eleventh Circuit and the Georgia Supreme Court raise serious questions as to the constitutionally permissible scope of prosecutorial comment on the role of mercy in the jury's sentencing decision. Because we granted certiorari in *California* v. *Brown*, *supra*, to decide a closely related issue, I dissent from the present denial of this petition.